



Doc Code: AP.PRE.REQ

Under the Paperwork Reduction Act of 1995, no persons are required to respond to a collection of information unless it displays a valid OMB control number.

PTO/SB/33 (07-05)

Approved for use through xx/xx/200x. OMB 0651-00xx
U.S. Patent and Trademark Office; U.S. DEPARTMENT OF COMMERCE

PRE-APPEAL BRIEF REQUEST FOR REVIEW		Docket Number (Optional) 4389	
I hereby certify that this correspondence is being deposited with the United States Postal Service with sufficient postage as first class mail in an envelope addressed to "Mail Stop AF, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450" [37 CFR 1.8(a)] on <u>November 30, 2007</u> Signature <u>Floyd B. Carothers</u> Typed or printed name <u>Floyd B. Carothers</u>	Application Number 10/642,976	Filed 08/18/2003	
	First Named Inventor Brian E. Dalton		
	Art Unit 3733	Examiner Swiger III, James L.	
Applicant requests review of the final rejection in the above-identified application. No amendments are being filed with this request.			
This request is being filed with a notice of appeal.			
The review is requested for the reason(s) stated on the attached sheet(s). Note: No more than five (5) pages may be provided.			
I am the		<u>Floyd B. Carothers</u> Signature	
<input type="checkbox"/> applicant/inventor.		<u>Floyd B. Carothers</u> Typed or printed name	
<input type="checkbox"/> assignee of record of the entire interest. See 37 CFR 3.71. Statement under 37 CFR 3.73(b) is enclosed. (Form PTO/SB/96)		<u>(412) 471-3575</u> Telephone number	
<input checked="" type="checkbox"/> attorney or agent of record. Registration number <u>24,252</u>		<u>November 30, 2007</u> Date	
<input type="checkbox"/> attorney or agent acting under 37 CFR 1.34. Registration number if acting under 37 CFR 1.34 _____			
NOTE: Signatures of all the inventors or assignees of record of the entire interest or their representative(s) are required. Submit multiple forms if more than one signature is required, see below*.			
<input checked="" type="checkbox"/> *Total of <u>2</u> forms are submitted.			

This collection of information is required by 35 U.S.C. 132. The information is required to obtain or retain a benefit by the public which is to file (and by the USPTO to process) an application. Confidentiality is governed by 35 U.S.C. 122 and 37 CFR 1.11, 1.14 and 41.6. This collection is estimated to take 12 minutes to complete, including gathering, preparing, and submitting the completed application form to the USPTO. Time will vary depending upon the individual case. Any comments on the amount of time you require to complete this form and/or suggestions for reducing this burden, should be sent to the Chief Information Officer, U.S. Patent and Trademark Office, U.S. Department of Commerce, P.O. Box 1450, Alexandria, VA 22313-1450. DO NOT SEND FEES OR COMPLETED FORMS TO THIS ADDRESS. SEND TO: Mail Stop AF, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450.

If you need assistance in completing the form, call 1-800-PTO-9199 and select option 2.



Patent
Attorney Docket No. 4389

UNITED STATES PATENT AND TRADEMARK OFFICE

Applicant:	Brian E. Dalton)	
)	
Application No.:	10/642,976)	Swiger III, James L.
)	Patent Examiner
Filed:	August 18, 2003)	Art Unit 3733
)	
For:	CERVICAL COMPRESSION PLATE)	
	ASSEMBLY)	
			Pittsburgh, Pennsylvania

STATED REASONS FOR PRE-APPEAL BRIEF REQUEST FOR REVIEW

Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Sir:

In the final rejection of September 7, 2007, the Examiner rejected claims 1 - 2, 5 - 6, 8, 10 - 11, 14 - 15 and 17 under 35 U.S.C. 102(b) as being anticipated by Beer et al. The Examiner also rejected the identical claims as being anticipated by Sevrain. Lastly, the Examiner rejects claims 3 - 4 and 12 - 13 under 35 U.S.C. 103(a) as being unpatentable over Sevrain in view of Richelsoph et al. In claim 7 and 16 under 35 U.S.C. 103(a) as being unpatentable over Sevrain in view of Serbousek et al.

Applicant claims in claim 1 a cervical compression plate assembly, for example as seen in FIG. 10, having screw receiving elements 11 and 12 at opposite ends thereof which are configured for engaging bone fixation screws extending from respective vertebral elements. Means are provided in the form of ratchet pawl mechanism 51 which includes a washboard rack 52 provided in upper

plate 25 and a flexible pawl 53 provided on lower plate 24 which permits the distance between the screw receiving elements 11 and 12 at opposite ends to be shortened, but thereafter prevents the distance from increasing between the elements. The primary improvement of this cervical compression plate assembly is the provision of compression spring means 50 which are housed in the assembly and “configured for continuously urging said screw receiving elements at opposite ends together”.

While at first glance one might believe that the compression springs force the two screw receiving elements 11 and 12 apart, this in fact is not the case. The assembly is configured whereby the compression springs do just the opposite and continually compress the two elements together so that they converge toward each other.

The object is that the two screw receiving elements 11 and 12 are respectively secured by screws or other securement fasteners to adjacent vertebra and the disc between vertebra is removed and substituted with a human donor bone segment. The object then is to cause the adjacent vertebra to continuously compress against the implanted bone segment to thereby provide continuous compressive loading on this bone graft material disposed between the vertebral elements.

The Examiner incorrectly takes the position that Beer et al. discloses a device that “is capable of providing loading on graft material (12) disposed between the vertebral elements”. This is clearly incorrect and not so disclosed or suggested by the reference.

Beer et al. discloses a prosthesis element that does not and cannot impose loading on a bone graph material interposed between adjacent vertebral elements, but to the contrary is in fact an artificial prosthetic spring loaded device positioned between adjacent vertebral elements in substitution of the removed disc. The Examiner seems to take the position that because the springs of this device are securely connected to his upper and lower plates 11a and 11b that therefore that this device can function as Applicant's claimed device. This is impossible. Beer et al. discloses a device that does exactly the opposite to the teachings of Applicant's claimed invention and cushions or pushes or urges the adjacent vertebral elements apart.

Similarly, the Examiner states that Sevrain discloses a device "that is capable of holding the plates in compressed position". This is totally inaccurate and incorrect. The plate assembly of Sevrain utilizes compression springs to continuously urge his screw receiving elements 30 and 32 apart, not together.

The Examiner's rejection of claims 3 - 4 and 12 - 13 under 35 U.S.C. § 103 are improper for the same reasons.

Then in response to Applicant's arguments, the Examiner further states that Beer et al. is constructed that "It is held that the spring is capable of both permitting and limiting features regarding the spacing of the plate assembly. As functionally recited, the spring is capable of continuously urging the screw-receiving elements in causing compression to the material between the plates."

This is not only inaccurate and improper, it is completely impossible. Simply because the compression springs used in Beer et al. are secured at their opposite ends to the respective upper and lower plates does not mean they can function as the Examiner states.

Then, the Examiner's response to the final rejection states once again that the springs of Beer et al. are capable of performing the same actions. This is totally incorrect and impossible and Applicant should not be forced to go through an entire appeal procedure to prove his case. There is absolutely no manner in which Beer et al. or Sevrain could possibly function to accomplish the results accomplished by Applicant's invention as claimed.

In addition, the Examiner further asserts that the spring means is functionally recited as "continuously urging". This, once again, is an incorrect observation and incorrect statement. Applicant in claim 1 positively claims a spring means housed in the assembly which is configured for continuously urging the screw receiving elements at opposite ends together. This is not functional language. The mere addition of functional language to further codify or solidify the description is not in itself a limitation but merely describes the fact that this accordingly thereby provides continuous compressive loading on bone graft material that is disposed between the vertebral elements.

Accordingly, the Examiner should be overturned and notice of allowance issued.

Respectfully submitted,

CAROTHERS AND CAROTHERS

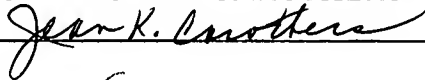


Floyd B. Carothers
Attorney for Brian E. Dalton
Fort Pitt Commons, Suite 500
445 Fort Pitt Boulevard
Pittsburgh, PA 15219

FBC:jkc
Reg. No. 24,252
(412) 471-3575
(412) 281-2180
Pitntpatent@aol.com

I hereby certify that this correspondence is being deposited with
the United States Postal Service with sufficient postage as Express
Mail in an envelope addressed to: Commissioner for Patents,
P.O. Box 1450, Alexandria, VA 22313-1450, on Nov 30, 2007

CAROTHERS AND CAROTHERS



ED152202496US)